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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GLADYS MURRAY, On Behalf Of Herself And All Others Similarly Situated (and 27 Other Individuals),

Petitioners,

VS.

STUCKEY'S INC. and PET INCORPORATED,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals appropriately determined that the District Court erred in applying the law defining the executive exemption under the Fair Labor Standards Act to the facts of this case?

2. Whether it is appropriate for this Court to grant review of a decision which is not contrary to prior decisions of this Court, the Eighth Circuit or the other Circuits and which simply holds that the District Court misapplied the law to the facts of this case?

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STATEMENT OF THE CASE

Petitioners are former managers of retail convenience stores owned and operated by Stuckey's, Inc. At all times pertinent to Petitioners' claims, Stuckey's, Inc. was a wholly owned subsidiary of Pet, Incorporated. During the course of this litigation, Pet was a subsidiary of IC Industries which was later renamed Whitman Corporation. Currently, Pet is not affiliated with any other corporation.

The managers filed suit claiming they worked twenty-four (24) hours a day throughout their periods of employment. They

sought unpaid overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. §§ 201, *et seq.*). Stuckey's and Pet, hereinafter referred to as Respondents, claimed that the managers were exempt from the recordkeeping, minimum wage, and overtime pay requirements of the FLSA, pursuant to § 213(a)(1), because they were executive employees as defined by the regulations of the Secretary of Labor. Under the regulations, employees must meet the requirements of a six part test to qualify as exempt executives. 29 C.F.R. § 541.1.

Following trial in the United States District Court for the Northern District of Iowa, judgment was entered for the managers and back wages and liquidated damages were awarded to each, although not on the basis of twenty-four (24) hours worked per day. A subsequent Order was entered awarding attorneys' fees. Respondents appealed to the United States Court of Appeals for the Eighth Circuit. Following oral argument, a three judge panel unanimously reversed the District Court's decision on the back wages and damage awards to the managers and vacated the award of attorneys' fees. However, the panel did not make a complete determination on the exemption claims because the District Court had not made complete findings of fact and conclusions of law on all elements of the executive exemption test. The cause was remanded to the District Court for further consideration of remaining issues necessary to final adjudication of the managers' exempt or nonexempt status.

A Petition for Rehearing and Suggestion for Rehearing En Banc filed on behalf of the managers were subsequently denied by Order of the Eighth Circuit dated September 19, 1991. Respondents' counsel on appeal received copies of the Petition for Writ of Certiorari on December 3 and 4, 1991, respectively.

SUMMARY OF ARGUMENT

Respondents submit no legitimate reasons are presented by the Petition for reviewing certain rulings made by the Eighth Circuit Court of Appeals in this cause. Petitioners' contentions that the Eighth Circuit's decision conflicts with applicable decisions of this Court and that it conflicts with recent decisions of three other Circuit Courts of Appeals are without merit. These contentions, which are procedural in nature rather than substantive, stem from Petitioners' inability to recognize and differentiate questions of fact and questions of law and from their misinterpretation of the Eighth Circuit's rulings. Contrary to Petitioners' suggestions, the Eighth Circuit panel did not make factual findings on their own nor did they substitute their judgment of the facts for that of the District Court, without regard to the Rule 52(a) "clearly erroneous" standard of review.

Instead, the panel held that the District Court erred in applying the law, in the form of the Secretary's regulations and interpretations, to the undisputed facts of record. As a result, the Eighth Circuit reached different conclusions in determining whether Respondents' proof was sufficient to establish that store managers met two of the elements of the executive exemption test. To the extent that the District Court's "findings of fact" were predicated on its erroneous interpretations of the applicable law, the "clearly erroneous" standard was not controlling. Nonetheless, it is plainly evident from the opinion that the panel adjudged the District Court's rulings on these issues to be clear error. In so holding, it is equally evident that the Eighth Circuit was mindful of longstanding precedent under the FLSA that exemptions are to be narrowly construed and the employer is held to a strict burden of proof.

Furthermore, it is apparent that the methodology utilized by the panel in reaching its conclusions was fully consistent with the holdings of *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709

(1986). The fallacy of Petitioners' contrary argument can be readily seen by contrasting the Eighth Circuit opinion in this cause with that of the Ninth Circuit in *Icicle Seafoods* which this Court vacated. Whereas the Ninth Circuit engaged in an independent, *de novo* review of the facts in the trial court, the Eighth Circuit panel specifically focused on and analyzed each of the District Court's factual bases for its findings and conclusions. They then proceeded to analyze the applicable law and held that District Court had erred because, as a matter of law, the store managers clearly fit within the legal definitions for two elements of the executive exemption test. Therefore, the District Court's contrary holdings were reversed.

Petitioners and their counsel obviously disagree with the result. However, they have failed to show that the Eighth Circuit has interpreted substantive or procedural law in such a way that a conflict among the Circuits or with controlling decisions of this Court exists. No other special or important reasons for granting the Petition exist, particularly when the exemption claims have yet to be finally ruled by the lower courts. Review of the Eighth Circuit decisions is, therefore, unwarranted.

ARGUMENT

I. AN EMPLOYEE'S EXEMPT OR NON-EXEMPT STATUS UNDER THE FLSA IS A QUESTION OF LAW

The Eighth Circuit decision addressed five of the elements of the regulation which defines an executive employee for purposes of exemption from the minimum wage and overtime requirements of the FLSA. *See* 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.1(a)-(e). It is undisputed that a claim of exemption under § 213(a)(1) must be pleaded and proved by a defendant employer as an affirmative defense. Neither is it disputed that exemptions from the FLSA requirements have traditionally been narrowly construed. Nothing in the Court's decisions contravenes these principles of law. What the Court held is that the District Court erred as a matter of law in ruling that Respondents did not meet their burden of proof on two of the elements for the executive exemption claimed for Stuckey's store managers. Rather than engage in fact finding, the Court remanded the case to the District Court to consider the evidence pertinent to the three elements which it had failed to address and rule on the exemption.

In seeking review of the Eighth Circuit's rulings, Petitioners are obviously confused about the distinctions between questions of fact and questions of law. This is best exemplified by their repeated claim that whether or not Respondents sustained their burden of proof to show that managers were exempt executive employees is a question of fact. *See* Petition, pp. 8, 10 and 15. Such a claim reveals the fundamental misunderstanding upon which the Petition is based. The determination of exempt or nonexempt status in this kind of case is the ultimate *legal* issue. That is clear from this Court's decision in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), referencing an earlier decision in *Walling v. General Industries Co.*, 330 U.S. 545 (1947):

> "We therefore reaffirm our holding in *Walling* that the facts necessary to a *proper determination of the legal question whether an exemption to the FLSA applies in a particular case* should be reviewed by the Court of Appeals pursuant to Rule 52(a), like the facts in other civil bench - tried litigation in federal courts." 475 U.S. at 713 (emphasis added)

It could not be more clear. Yet Petitioners are unable or unwilling to accept that only the facts necessary to determination of legal questions are subject to review under the Rule 52(a) standard.

The exemption at issue in the *Icicle Seafoods* case excluded "any employee employed as a seaman" from the overtime requirements of the FLSA. 29 U.S.C. § 213(b)(6). This Court noted that the underlying question of how the plaintiffs spent their working time was a question of fact. However,

> "[T]he *question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law* which both parties concede is governed by the pertinent regulations promulgated by the Wage and Hour Administrator." 475 U.S. at 714. (emphasis added)

In the case at bar, what the duties and responsibilities of the store managers were and how they spent their working time are clearly questions of fact. It is equally clear that the determination of whether or not their activities and responsibilities were sufficient to qualify them for the executive exemption, as defined by the regulations, involves questions of law.

II. THE EIGHTH CIRCUIT DID NOT ENGAGE IN FACT-FINDING OR SUBSTITUTE ITS JUDGMENT FOR THAT OF THE DISTRICT COURT ON THE FACTS

In the first of their Questions Presented for Review, the Petitioners claim that the Eighth Circuit improperly engaged in fact finding contrary to the teachings of this Court's holding in *Icicle Seafoods, supra.* No specific example or instance is cited to support the claim. It can only stem from Petitioners' erroneous interpretation of the Eighth Circuit's ruling, as does the claim that the panel substituted their judgment of the facts in reversing the District Court.

The record shows that of the work related elements of the executive exemption, the District Court made specific findings of fact on only one, § 541.1(a), commonly referred to as the primary duty test. It provides that to be employed in a bona fide executive capacity within the meaning of the FLSA, an employee's primary duty must consist of the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof. The District Court held, both in its Findings of Fact and in its Conclusions of Law, that Respondents failed to prove that store managers had management as their primary duty. (Appendix C, pp. 36a-37a, 54a). On appeal, the Eighth Circuit methodically analyzed and reviewed the factual bases and rationale for the District Court's determination that the primary duty test was not met. In concluding that the District Court erred in construing the primary duty requirement, the panel did not engage in independent fact finding. Rather, the Court appropriately determined that the law had been misapplied on the undisputed facts of record.

A. The District Court's Findings.

The Eighth Circuit discerned that the District Court essentially relied on three factors to reach the conclusion that Respon-

dent failed to prove that store managers had management as their primary duty. It is immediately obvious from the analysis of the first factual basis for the District Court's ruling that the panel was fully cognizant of the "clearly erroneous" standard for setting aside findings of fact. The Court explicitly holds the finding by the District Court that managers spent 65-90 percent on nonexempt duties, "though imprecise and unexplained, is relevant *and not clearly erroneous*." (Appendix, p. 9a).[1] It is, therefore, evident that the Eighth Circuit did not simply ignore the standard of review applicable to findings of fact in a nonjury case as Petitioners would have this Court believe.

With respect to this percentage finding, the Eighth Circuit neither set it aside nor substituted its judgment as to a more appropriate percentage. This finding remained undisturbed. However, as the panel noted, the Secretary's interpretation of the term "primary duty" in § 541.103 and the First Circuit's 1982 decision in *Donovan v. Burger King Corp.*, 672 F.2d 221, 227 (1st Cir. 1982), support the legal proposition that a manager can spend more than 50 percent of his/her time on nonmanagerial work and still have management as his/her primary duty.[2]

Secondly, the District Court found that there was little difference in the duties of the store manager and their spouses who

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[1] Arguably, by failing to articulate the particular duties to which this percentage of time was devoted and simply describing them as not management-related and, therefore, non-exempt duties, this "finding" is in truth a conclusion of law. However, this was not of concern to the Eighth Circuit because percentages of time devoted to any particular kinds of tasks are not dispositive of an individual's primary duty, as a matter of law.

[2] Nothing was presented on appeal or in the Petition to suggest that the First Circuit improperly analyzed the primary duty test. In fact, the Petition makes no mention of, and cannot be considered to dispute, the Eighth Circuit's endorsement of the *Burger King* rationale quoted in the opinion. (Appendix, pp. 9a-10a).

worked as hourly employees. This finding was not set aside but the panel found it to be irrelevant to the determination of the managers' primary duty. Instead they pointed to the District Court's finding of fact that Respondent designated only one person at each store to be the manager and held, as a matter of law, that Respondents were entitled to have one designated exempt executive at each of their remotely located facilities. Whether or not other employees could or did perform management duties did not detract from the primary duty of the designated manager in charge of the store. Thus, whether or not the District Court's finding on the similarity of the manager and spouse's duties is clearly erroneous is of no consequence to the determination of the primary duty test. The Eighth Circuit held it was error to rely on this finding for the conclusion that Respondent failed to prove management was the primary duty of the designated store managers.

Finally, the District Court found that the store managers simply took orders and had little, if any, real involvement as managers. (Appendix, p. 37a). It then stated in its Conclusions of Law that Respondent's regional managers served as the "real managers" of the stores in the geographic areas for which they were responsible. (Appendix, p. 52a). However, the District Court also specifically noted in its Conclusions of Law that each of the managers who appeared in person at trial testified that they:

1. hired and fired employees;
2. trained, supervised and disciplined employees;
3. maintained inventory;
4. produced daily, weekly, and monthly financial reports; and
5. supervised other aspects of store operations.

(Appendix, p. 49a). Again in its Conclusions of Law, the District Court noted that store managers reported to regional managers who did not live at the stores but who made occasional visits and kept in contact with store managers by telephone on a weekly basis. (Appendix, p. 49a). Furthermore, in its Findings of Fact, the District Court found that each store was an independent location and, by necessity, was geographically separated from other company property. (Appendix, p. 26a).

The Eighth Circuit neither set aside the District Court's findings of fact nor made contrary or additional findings of its own. Rather, it rejected the District Court's self described *conclusion of law* that regional managers were the real managers of the stores. The result is that in the Eighth Circuit's view, the District Court misinterpreted the requirements of the primary duty test, thereby wrongly applying the law to the facts. The panel concluded that on the facts of record, Respondents had indeed carried their burden to show that store managers had management as their primary duty within the meaning of the Wage and Hour regulations. The District Court's holding was, therefore, reversed.

The same is true with respect to the "sole charge" exception to the limitations in § 541.1(e) on the amount of time which can be devoted to nonmanagement activities by an executive employee. The District Court held the exception was not applicable to the store managers. Its only explanation was that it relied on the same reasoning as set forth in its analysis of the primary duty question. (Appendix, p. 54a). The Eighth Circuit, based on the same facts of record, found it *clear* that the managers did meet the requirements for the sole charge exception. Accordingly, the panel ruled that the District Court erred in applying the law, in the form of § 541.113, to the facts of the store managers' employment.

B. Petitioners' Reliance On This Court's Decision In *Icicle Seafoods* Is Misplaced.

Petitioners suggest that the Eighth Circuit has somehow violated principles of law set forth in *Icicle Seafoods, supra*, in reversing the District Court. However, upon closer review of that decision it becomes apparent that this court was addressing an entirely different basis of error. The Ninth Circuit wrongly applied a *de novo* standard of review to the *factual* issues underlying the trial court's conclusion that employees were exempt seamen. *Nowhere in the Ninth Circuit opinion did that court ever mention any of the factual findings of the trial court, must less discuss them or analyze them.* This Court faulted the Ninth Circuit for conducting an independent review of the record and making contrary findings of fact on its own in order to reach a contrary conclusion on the exemption question.

The Eighth Circuit in the case at bar did not conduct a *de novo* review of the facts. Instead it did precisely what the Ninth Circuit failed to do in *Icicle Seafoods*. The panel started with the factors relied upon by the District Court for its findings and conclusions that Respondent had not sustained its burden of proof on the primary duty test and the sole charge exception. Each factor was then reviewed and analyzed individually. The Court then reversed the District Court's determination on these two issues because it held that proper rules of law were not applied to the factual findings. This approach was and is entirely consistent with the teachings of *Icicle Seafoods*.

III. FINDINGS OF FACT INDUCED BY AN ERRONEOUS VIEW OF CONTROLLING LEGAL PRINCIPLES ARE NOT BINDING

Petitioners insist that the question of a store manager's primary duty is a question of fact. Respondents readily concede that questions of fact are involved in determining the particular

activities and duties of store managers, i.e., how they spent their working time. But the teaching of *Icicle Seafoods* is that resolution of an exemption claims involves questions of both fact and law. Where questions of fact are predicated on an erroneous view of the law, Rule 52(a) does not prescribe the standard of review. *United States v. United States Gypsum Co.*, 335 U.S. 364, 394 (1948). The Eighth Circuit opinion is premised on the determinations that the District Court had misconstrued and misinterpreted the law, specifically in the form of § 541.102-103 and § 541.113, and misapplied it to the facts to reach the conclusion that store managers did not have management as their primary duty.

If it is assumed the District Court's holding that store managers did not satisfy the primary duty test is a finding of fact, it is apparent this finding resulted from erroneous application of controlling legal principles. As such, it was not binding on the appellate court. *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1980), *vacated* 451 U.S. 902 (1981), *opinion on remand*, 657 F.2d 750 (5th Cir. 1981). This Court held in *Bose v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984):

> "[B]ut Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of fact that is predicated on a misunderstanding of the governing rule of law."

In this case, the Eighth Circuit did not substitute its judgment of the underlying facts relevant to the duties, responsibilities and role of the store managers and the actual work they performed, for that of the District Court. It did substitute its interpretation of the legal requirements for two elements of the executive exemption, for that of the District Court. In so doing, the Eighth Circuit acted in accordance with the accepted course of judicial proceedings for an appellate court. Respondents were and are

entitled to a reversal of the District Court's erroneous interpretations of the law governing the executive exemption. Respondents were rightfully held to a higher standard of proof in claiming an exemption from the FLSA but Petitioners' suggestion that equal treatment in the appellate process should not be afforded them just because of their employer status is entirely unfounded.

In further support of their claim that "the question of exemption was a question of fact", Petitioners contend the regulations with respect to primary duty "so state", referring to 29 C.F.R. § 541.103. (Appendix, pp. 10-11). Interestingly, the Eighth Circuit specifically relied on § 541.103 in holding that the District Court erred as a matter of law in not finding that Respondent proved that management was the primary duty of its store managers. (Appendix, p. 9a). The very first sentence of § 541.103 states:

> "[A] *determination* of whether an employee has management as his primary duty must be based on all the facts in a particular case." (emphasis added).

Work which is considered to be management or "exempt" work is defined by the Secretary of Labor, as noted by the Eighth Circuit, in § 541.102. (Appendix, p. 11a). Therefore, the "determination" referred to by the Secretary in § 541.103 can only be made by comparing the facts of a manager's employment with the legal definitions of the terms "management" and "primary duty".

Again, it it is assumed that the "determination" of whether an employee has management as his primary duty is a question of fact rather than of law, it must be recognized that such an ultimate finding *incorporates* both fact and law. Where such a finding incorporates error as to the law, it is not subject to the clearly erroneous standard of review. *United States v. United States Gypsum Co., supra; Harrison v. Indiana Auto Shredders Co.*, 528 F.2d 1107 (7th Cir. 9175), *Stafos v. Jarvis*, 477 F.2d 369

(10th Cir.), *cert. denied*, 414 U.S. 944 (1973). A determination that a manager is in sole charge of a physically separated branch establishment is no different. It requires the comparison of the facts of the manager's employment with the legal definitions of the terms "sole charge" and "physically separated branch establishment". Thus, at the very least, the Eighth circuit was within its authority to set aside ultimate findings of fact even though underlying findings of fact were not clearly erroneous. Such ultimate findings were defective because the District Court incorporated and applied erroneous interpretations of the law governing the exemption.

IV. THE DISTRICT COURT'S RULINGS WERE CLEARLY ERRONEOUS

In any event, if the Eighth Circuit's reversal of the District Court's rulings is perceived as setting aside findings of fact rather than correcting errors of law, it is plainly evident from the opinion that the panel found the rulings on the primary duty test and sole charge exception to be clearly erroneous. For instance, after reviewing the requirements for a determination that a manager is in sole charge of a branch establishment, as defined in the regulations, the Court noted that:

> "the sole charge exception seems to be written for employees like these store managers. . . . It is clear that Stuckey's store managers satisfy these sole charge standards." (Appendix, p. 15a).

Under these circumstances, the District Court's contrary findings and/or conclusions had to be clear error.

Because the managers were in sole charge of their stores, based on the definition given in § 541.103 and cited in the Eighth Circuit opinion, they had to have management as their primary duty. The panel held:

> "[I]n this case, it is undisputed that the plaintiff store managers were the on-site employees ultimately responsible for the stores operations, even though their discretion was circumscribed. Thus, their responsibilities placed them *squarely* within the dictates of the above regulation, as construed by *Burger King* and other decisions dealing with comparable multi-store operations." (Appendix, p. 13a). (emphasis added).

Based on this holding, the District Court's contrary findings and/or conclusions had to be clear error.

The Eighth Circuit did not construe its holdings as setting aside findings of fact but even if the decision is scrutinized under the Rule 52(a) standard, there is no doubt that the standard was met. The decisions convey that the Court was "left with the definite and firm conviction" that mistakes had been committed. *Anderson v. Bessemer City, N.C.*, 470 U.S. 562 (1985). Whether they are categorized as mistakes of fact or mistakes of law, the outcome would be the same. The District Court clearly erred in findings and concluding that Respondents did not meet their burden of proof to show that managers were in sole charge of their stores and had management as their primary duty.

V. NONE OF THE CONSIDERATIONS FOR REVIEW ON WRIT OF CERTIORARI ARE PRESENT IN THIS CASE

The Eighth Circuit has correctly ruled in this case that Respondents proved, as a matter of fact and of law, Stuckey's store managers met two of the elements necessary for exemption from FLSA wage and overtime requires as executive employees. The Court correctly deferred ruling on elements of the exemption requirements which were not addressed by the District Court and has remanded the case for the entry of further findings of fact and conclusions of law.

Insofar as the merits of the Eighth Circuit decision are concerned, Petitioners have pointed to no appellate cases which conflict with the Court's interpretations of the primary duty test or the sole charge exception. Petitioners cannot and do not argue that the Eighth Circuit has erroneously interpreted or applied the law. They simply argue that the Court should not have reversed the District Court's "findings of fact". It is apparent the Eighth Circuit based its reversal on perceived errors of law. However, because it found the District Court holdings to be clear error, the result would be no different whether or not the Rule 52(a) standard of review was applied. For that reason, there is absolutely nothing about this case that requires the attention of this Court.

Petitioners advance the argument as the last of their Questions Presented for Review that the Eighth Circuit has departed from the accepted and usual course of judicial proceedings. Respondents submit that such an argument borders on being frivolous. The sole basis for it is the representation that Petitioners have found no other Courts of Appeals decisions which overturned findings in favor of employees on the primary duty test or the executive exemption. Apparently, they did not bother to read the First Circuit's *Burger King* decision cited and relied upon as legal precedent in the Eighth Circuit's opinion. However, Petitioners' or their counsel's lack of diligence aside, whether any similar cases exist is totally irrelevant. FLSA exemption cases are peculiar because they are always dependent on individual fact situations. Petitioners' argument amounts to nothing more than saying that an award to employees should never be reversed. Such a proposition is patently absurd.

No reasonable interpretation of the Eighth Circuit opinion in this case could lead to the conclusion that the panel "dramatically departed from the accepted and usual course of judicial proceedings" or that this case "cries out for the exercise of this Court's power of supervision" (Petition, p. 15). The action of the panel

fully comports with the principles of law enunciated in *Icicle Seafoods, supra.*

CONCLUSION

Petitioner has not shown the existence of any significant issue of substantive or procedural law, let alone special or important reasons, which call for review or supervision by this Court on writ of certiorari. The Eighth Circuit's rulings are not in conflict with the decisions of this Court cited by Petitioners nor are they in conflict with other circuits which have interpreted the burden of proof in FLSA exemption cases. The Eighth Circuit has corrected what otherwise would have been a grievous error, based on its determination that store managers clearly and unmistakenly met the terms and spirit of the primary duty test and sole charge exception under § 541.1(a) and (e). *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir.), *cert. denied*, 108 S. Ct. 2845 (1988). The case should be returned to the District Court for further proceedings in accordance with the opinion.

Accordingly, the Petition should be denied.

Respectfully submitted,

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